

Exhibit 21

Pages 789 - 1036

NORTHERN DISTRICT OF CALIFORNIA

IN RE GOOGLE PLAY STORE
ANTITRUST LITIGATION,

THIS DOCUMENT RELATES TO:

Plaintiff,

NO. 3:20-cv-05671-JD

Defendants .

TRANSCRIPT OF PROCEEDINGS

Rhonda Aquilina, CSR 9956, RMR, CRR
Official United States Reporter

Case 4:20-cv-00957-SDJ-DWM Document 339-25 Filed 04/22/24 Page 32 of 48 #: 11217

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Thursday, November 9, 2023 - Volume 5

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TRIAL EXHIBITS

IDEN EVID VOL.

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1410	819	5
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5653		873	5
5696		840	5
5714		850	5
5816		877	5
5911		901	5
5941, cover page, page 10 and page 11 only		907	5
6044		902	5
6390		843	5
6454		1023	5
6462		1007	5
6464		993	5
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DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q. Ms. Garber, good afternoon.

A. Good afternoon.

Q. You are a lawyer; am I right?

A. Yes, that's right.

Q. And you are a lawyer who works at Google?

A. Yes.

Q. You're a Google employee?

A. Yes.

Q. And you've been at Google for a little over 9 years now; is that correct?

A. Yes, that's right.

Q. And your responsibilities include managing something called the Ads Policy Product Counsel Team; is that right?

A. Yes, that's right.

Q. And as an attorney you are generally familiar with the concept of attorney-client privilege; am I right about that?

A. I'm generally familiar, yes.

Q. All right. So attorney-client privilege is a legal concept that protects confidential communications that clients have with their lawyers about requesting legal advice and receiving legal advice; is that fair?

A. I think that's generally correct.

Q. And when a communication is privileged, it is protected from

1 being disclosed to the other side in a lawsuit like this one,
2 right?

3 A. In some circumstances.

4 Q. In almost all circumstances, right, a privileged
5 communication is supposed to be kept secret within the company
6 and not disclosed in litigation, right?

7 A. I don't think that's always true, but sometimes.

8 Q. Okay. I'm not asking about sometimes. My question,
9 Ms. Garber: It's almost always the case that privileged
10 communications are supposed to be kept secret and not disclosed
11 to the other side in litigation; fair?

12 A. No, that's not my understanding.

13 Q. It's your understanding that these documents are just freely
14 shared in litigation?

15 A. In some circumstances they're shared.

16 Q. Okay. Just so the record is clear, your view as a lawyer is
17 that privileged communications are not typically withheld in
18 litigation; is that your testimony under oath?

19 A. No, I didn't say typically. I think it depends on the
20 circumstances.

21 Q. Okay. So would you please answer the question, Ms. Garber?

22 Typically, privileged communications are withheld from
23 sharing with the other side in litigation, correct?

24 A. In United States litigation normally.

25 THE COURT: I need you to get a little closer to that

1 microphone, please.

2 **THE WITNESS:** Sorry.

3 **THE COURT:** Or you can pull it towards you.

4 All right. Go ahead.

5 **BY MR. BORNSTEIN:**

6 **Q.** I'm sorry, could you repeat the answer to the question?

7 **A.** I think typically in typical United States litigation.

8 **Q.** Fair. Thank you.

9 Now, will you agree with me that a document doesn't
10 become privileged just because one of the recipients is a
11 lawyer, yes?

12 **A.** Yes, I agree.

13 **Q.** As a lawyer you can be part of communications that are not
14 privileged, correct?

15 **A.** Yes, that's true.

16 **Q.** And just labeling a document "privileged" also doesn't make
17 the document actually privileged, correct?

18 **A.** Yes, I agree.

19 **Q.** Right. Like if you have a pint of vanilla ice cream and you
20 put a label on it that says "chocolate," it doesn't actually make
21 the ice cream vanilla; fair?

22 **A.** I think that's true.

23 **Q.** Right. The label is just wrong; correct?

24 **A.** I think that's right.

25 **Q.** All right. So privilege depends on the content of the

document rather than the label that somebody puts on it, right?

A. It does depend on more than the label.

Q. Right. It depends on the content, correct, as well as the fact that a lawyer is involved?

A. And the circumstances of the generation, yeah.

Q. Very good. Now, you, at Google, you have a colleague named Tristan Ostrowski; is that right?

A. Yes, that's right.

Q. And Mr. Ostrowski is also a lawyer?

A. Yes, that's right.

Q. And his responsibilities include supporting the Google Play Store business; is that right?

A. Yes, that's right.

Q. And you and Mr. Ostrowski have, during your time at Google, regularly communicated with one another as part of your job, right?

A. Yes, that's true.

Q. Okay. Now, you should have a binder in front of you there, and I would like you, please, to turn to Exhibit 6487 in the binder. There should be a tab that helps you find it.

A. Okay. I think I have it.

Q. Great. And this is a Google Chat communication that you had with Mr. Ostrowski in January of 2021; is that correct?

A. Yes, that looks right.

MR. BORNSTEIN: Your Honor, I move the admission of

1 Exhibit 6487, please.

2 **MS. CHIU:** Your Honor, we don't have objections. We
3 just have -- I just wanted to confirm we have an agreement only
4 certain portions of this document will be shown to the jury.

5 **MR. BORNSTEIN:** Correct.

6 **MS. CHIU:** No objections.

7 **THE COURT:** You know which portions?

8 **MR. BORNSTEIN:** We have discussed in advance, Your
9 Honor. Yes, we have.

10 **THE COURT:** Admitted on that basis. Go ahead.

11 (Trial Exhibit 6487 received in
12 evidence.)

13 **BY MR. BORNSTEIN:**

14 **Q.** Thank you. Now, Ms. Garber, we have this chat to look at
15 because either you or Mr. Ostrowski had your history set to "on"
16 while this conversation was happening, right?

17 **A.** That's correct, for this chat, yes.

18 **Q.** Right. Or at least the portions of the chat that we have,
19 right?

20 **A.** Yes.

21 **Q.** Okay. And we've heard a lot of discussion about chat in the
22 courtroom, so I'm going to spare people, but just one or two
23 questions.

24 Google Chat is a communication method where you can
25 have substantive business communications with your colleagues,

1 correct?

2 A. Yes, you could have any type of communications.

3 Q. Right. And you, in fact, do have substantive business
4 communications with your colleagues over Google Chat, right?

5 A. Yes.

6 Q. That said, Google Chat is a forum where people tend to be
7 more candid and informal in their communications, correct?

8 A. I would say informal, but not necessarily more candid.

9 Q. Well, you say things in chat that you may not feel
10 comfortable putting in an email, correct?

11 A. No, that's not really my understanding.

12 Q. All right. Well, let's take a look at this chat then,
13 Ms. Garber.

14 Can we have that published, please? I want to look at
15 page 12. Thank you.

16 And I want to just clear out one administrative thing
17 first. Do you see, we have on the screen there's a chat from
18 you that ends with something that has a bunch of funny
19 characters in it, an ampersand, a hatch sign, a 39, and a
20 semicolon; do you see that?

21 A. Yes.

22 Q. Okay. Do you understand that's just kind of supposed to be
23 an apostrophe, and what you were saying there is "Let's get
24 Jonathan to dial in?"

25 A. Yes, I think that's right.

1 Q. Okay. It comes up this way all through the document, and I
2 want to be sure we're reading it and understanding it the same
3 way, so I appreciate that.

4 So let's take a look, if we can, at the next chat
5 down, which is also from you that says, "Ads team is freaking
6 out about some Play VP escalation."

7 Do you see that?

8 A. Yes.

9 Q. Okay. And the ads team refers to your area of the business,
10 correct?

11 A. Yes, that's right.

12 Q. And "Play" refers to the Google Play Store, right?

13 A. Yes, I think so.

14 Q. And Play VP means someone who has a vice-president title
15 within the Play organization, correct?

16 A. Yes, I think that's right.

17 Q. And you were writing this to Mr. Ostrowski because he had
18 responsibilities in connection with the Play Store, and you
19 wanted to connect with him on this issue, correct?

20 A. Yes, that's right.

21 Q. And this idea of escalation that you referenced, that means
22 that somebody was bringing some issue or disagreement or
23 discussion further up the chain for discussion, correct?

24 A. Yes, that's right.

25 Q. And you ask Mr. Ostrowski if he wants to discuss this issue

1 with you, right?

2 A. Yes.

3 Q. And so if we can go a little further down in the chat,
4 Mr. Ostrowski responds and he says, "Oh, yeah, I can discuss.
5 What is it?" He asks you, right?

6 A. Right. Yes.

7 Q. And you say in response, even further down: "I haven't been
8 fully looped in either," right?

9 A. Right. Yes.

10 Q. Okay. So at this point in time you were not really terribly
11 aware of what the issue was that you had raised with
12 Mr. Ostrowski to discuss, correct?

13 A. Yeah, I was somewhat aware, but I think not fully aware.

14 Q. Okay. So let's go to the next page, and on the next page of
15 the document you say to Mr. Ostrowski, "so far as I can read it."
16 And then you proceed to explain what the issue was, right?

17 A. Yes.

18 Q. Okay. And you say, "so far as I can read it," because you
19 were working off of an email that you had been sent without any
20 other context about this issue, correct?

21 A. I, I don't remember fully, but I don't think I had much
22 other context, if any.

23 Q. Okay. And you go on to describe the issue. And in the next
24 chat you say that you understood that it related to prohibiting
25 ads leading to non-Play downloads with a couple of exclamation

1 points.

2 Do you see that?

3 A. Yes.

4 Q. All right. But then it seems that Play and Ads, as you put
5 it, settled for some reasonable intermediate policy, right?

6 A. That's right.

7 Q. And I want to drop down then to the bottom or near the
8 bottom of this page where you say despite that settlement, so to
9 speak, apparently Play was escalating again because they were mad
10 about some things, correct?

11 A. Yes, that looks right.

12 Q. And, again, you say "apparently" because you still -- you
13 didn't know a tremendous amount about what was going on, and you
14 had just received this one email about it, right?

15 A. Yes, I think that's right.

16 Q. And you had not, at this point in time, been consulted for
17 legal advice on this question, correct?

18 A. I can't remember whether or not that's true.

19 Q. Okay. Well, let's see if I can refresh you by continuing to
20 go down the document a bit.

21 The way that you described at the time the way you had
22 been informed about this is that you had been looped in for
23 "fake privilege," correct?

24 A. Yes, I see I wrote that.

25 Q. Okay. And what you understood at the time or your belief at

1 the time was that someone had included you on the email because
2 that person knew you were a lawyer, and they believed that
3 including you would make it more likely that the email would be
4 considered privileged, correct?

5 **A.** I, I think they had a misapprehension about the rules of
6 privilege.

7 **Q.** Understood. But your understanding was that this individual
8 who had copied you had a misapprehension about the rules, but
9 copied you for the reasons that I just stated, correct?

10 **A.** I wasn't sure what the intentions of the person adding me
11 was.

12 **Q.** Okay. But you understood that this was a document in which
13 you were copied not for a request for legal advice, but in order
14 to try to establish what you referred to as fake privilege,
15 correct?

16 **A.** I, I originally wasn't clear on what the request for legal
17 advice was in that email, although when I looked at it more
18 closely I saw there was a --

19 **THE COURT:** Okay. Ms. Garber, that's not the
20 question.

21 **THE WITNESS:** Oh, sorry. Maybe I misunderstood the
22 question.

23 **THE COURT:** The question is -- ask it again.

24 Please listen carefully and answer the question that's
25 posed.

1 BY MR. BORNSTEIN:

2 Q. You believed at the time that you had been copied on this
3 communication because somebody had a misapprehension about the
4 way privilege worked, correct?

5 A. Yes, that was my initial understanding.

6 Q. And you referred to that situation, to your colleague
7 Mr. Ostrowski, as an instance of fake privilege, correct?

8 A. Yes, I did.

9 Q. And at this point in time you were not even aware of the
10 meeting that had happened that led to the issue that was
11 discussed in this email, right?

12 A. I don't remember what I was previously aware of.

13 Q. Well, you say just at the bottom, "So seems like there was a
14 VP meeting yesterday," question mark, right?

15 A. Yes.

16 Q. So you were, again, you were intuiting that from this email
17 that you had just been looped in on for fake privilege, correct?

18 A. I don't recall where I learned about the VP meeting.

19 Q. All right. Well, Mr. Ostrowski, let's focus on his response
20 to your email.

21 He doesn't say gosh, what do you mean by "fake
22 privilege," correct?

23 A. I don't see him saying that.

24 Q. And he doesn't express any confusion whatsoever about what
25 you meant, right?

1 A. No, I don't see anywhere where he expresses confusion.

2 Q. Right. And you didn't feel the need to explain to him what
3 you meant, right? You don't say that anywhere, correct?

4 A. No, that seems correct.

5 Q. Right. Because you understood that Mr. Ostrowski, in the
6 Play store business, knew full well what fake privilege was,
7 correct?

8 A. I don't think that was my meaning.

9 Q. Well, it was a perfectly well understood concept what fake
10 privilege was, so well understood that you were able to use the
11 term without any explanation to your colleague, and he had no
12 question in response to you about what it meant; fair?

13 A. No, I don't think that's a fair interpretation.

14 Q. Okay. There are --

15 THE COURT: Ms. Garber, why did you say "fake
16 privilege" in that chat?

17 THE WITNESS: Well, I certainly regret the wording
18 that I used. I was using --

19 THE COURT: You sure -- okay. Why did you say -- when
20 you wrote this, why did you say "fake privilege?"

21 THE WITNESS: I meant that I believed privilege had
22 been incorrectly applied by the clients. What I meant was a
23 mistaken use of privilege.

24 THE COURT: You used the word "fake" rather than
25 "mistaken?"

1 **THE WITNESS:** Yes, due to the casual nature of the
2 conversation.

3 **THE COURT:** Go ahead.

4 **BY MR. BORNSTEIN:**

5 **Q.** So we can agree chats are indeed more casual conversations,
6 correct?

7 **A.** In many cases they can be.

8 **Q.** But this phenomenon of fake privilege that we've been
9 looking at, this was not a one-time event, correct?

10 **A.** I'm not sure what you mean by that.

11 **Q.** I mean, you used the words "fake privilege" to describe this
12 situation in other instances, not just in this one chat; am I
13 right?

14 **A.** I've used those words in other contexts. I don't know if
15 I was describing the same thing.

16 **Q.** Sure. Well, why don't we take a look at Exhibit 6488.
17 That, too, is in your binder.

18 **A.** Okay.

19 **Q.** Great. And this, too, is a chat between you and
20 Mr. Ostrowski, correct? Same person?

21 **A.** Yes, that's right.

22 **Q.** And this chat is dated March 17, 2022, right?

23 **A.** Yes.

24 **Q.** So that's a little over a year after the chat that we were
25 just looking at, correct?

1 **A.** Yes.

2 **MR. BORNSTEIN:** Your Honor, I'd move the admission of
3 Exhibit 6488, please.

4 **MS. CHIU:** No objections, pending --

5 **THE COURT:** Admitted.

6 (Trial Exhibit 6488 received in
7 evidence.)

8 **BY MR. BORNSTEIN:**

9 **Q.** Now, in this chat, you and Mr. Ostrowski are joking around;
10 is that correct? I'm going to ask you -- sorry. Let me ask you
11 to look at page 48 of the chat. And we can put that on the
12 screen, please.

13 And if it helps you for context, you can maybe start
14 reading at 47, but I'm going to ask you about page 48,
15 Ms. Garber. And my question is just you and Mr. Ostrowski are
16 kind of joking around and being friendly with one another here?

17 **A.** Yes, I think that's right.

18 **Q.** Okay. And you're joking about things like the early morning
19 meetings and the kind of work-from-home situation during the
20 pandemic; is that right?

21 **A.** Yes, I see us joking about morning meetings.

22 **Q.** And if we go up a little bit, the second chat in the -- on
23 this page, you say, "I feel like everyone just in 9 hours of
24 meetings a day straight." Yes?

25 **A.** Yes.

1 Q. I know the feeling. This was a complaint about your
2 workload; fair?

3 A. Yes.

4 Q. A good-natured complaint, I acknowledge, but a complaint
5 about your workload?

6 A. Yes, a complaint about the amount of meetings we had.

7 Q. Yes, like I said, I sympathize.

8 A little further down you say, "At least ARRIS,
9 A-R-R-I-S, going to take a lot of work off our plate."

10 Do you see that?

11 A. Yes.

12 Q. And ARRIS is a group within Google's legal department,
13 correct?

14 A. I think it sits outside the legal department, but it's a
15 team of lawyers.

16 Q. Okay. And they have responsibilities for certain types of
17 things that are within their purview, correct?

18 A. Yes, that's right.

19 Q. And you make a joke a little further down. You say,
20 "They'll do all the counseling, and we'll be on the beach playing
21 bocce," right?

22 A. Yes.

23 Q. And Mr. Ostrowski, he understands that this is a joke. He
24 responds to you a little further down: "Oh, yeah, they'll do all
25 the hard parts."

1 Right?

2 A. Right.

3 Q. Right. So meaning the hard parts of the job or the work
4 that they were going to relieve you of doing, this ARRIS group,
5 right?

6 A. Yes, I think that was the substance of the joke.

7 Q. Right. And then you respond: "Yeah, like the fake
8 privilege." Correct?

9 A. That's right.

10 Q. And this was sarcasm, yes?

11 A. Yes.

12 Q. Okay. But you understood that the ARRIS team was not
13 actually taking over the hard parts of your job, right?

14 A. Sorry. I'm not totally sure I understand the question.

15 Q. Sure. I'll back up a little bit.

16 You and Mr. Ostrowski did not think very highly of the
17 ARRIS team; is that fair?

18 A. I don't know if we had a general opinion.

19 Q. Okay. Well, Mr. Ostrowski says to you, right under the
20 "fake privilege" chat, he says, "definitely not poorly duplicate
21 work and take credit after auditing and indicting."

22 Do you see that?

23 A. Yes.

24 Q. Okay. That's an unflattering comment he's making about the
25 ARRIS team; is that fair?

1 A. I think that's fair.

2 Q. Okay. And you respond: "Ha ha, oh my God, that whole thing
3 insane." Right?

4 A. It looks like I said that in response to something that's
5 been redacted.

6 Q. Yes, indeed, I agree, something has been redacted.

7 But you say "Ha ha, oh my God, that whole thing
8 insane." Correct?

9 A. Yes.

10 Q. All right. So you were at least expressing support or
11 sympathy for Mr. Ostrowski's view about the ARRIS team, correct?

12 A. I'm not sure if my statement was in response because I'm
13 not sure what's missing.

14 Q. All right. Well, let me back up then.

15 Am I right that you did not hold the view that ARRIS
16 was going to be taking over the hard parts of your job?

17 A. Not fully.

18 Q. Okay. And you did not consider the "fake privilege"
19 communications to be a terribly challenging part of your job
20 either; am I right?

21 A. No, that wasn't part of our job at all.

22 Q. Indeed. You were copied on these communications not because
23 your legal advice was being requested, but just because you were
24 a lawyer, correct?

25 A. I'm not sure which communications you're referring to.

1 Q. All right. Well, again, Mr. Ostrowski didn't respond to
2 your second "fake privilege" communication that we have, at least
3 because history is on, again, by asking you any questions about
4 what you meant, correct?

5 A. Not that I see.

6 Q. Right. Because Mr. Ostrowski, who worked in the Play Store
7 Business, was fully aware of the concept at Google of copying
8 lawyers for fake privilege, correct?

9 A. No, I think it was because that was a sarcastic statement
10 in response to external litigation.

11 THE COURT: That's not an answer. Listen to the
12 question and answer it.

13 THE WITNESS: Okay. Sorry. Will you ask it again?

14 THE COURT: Take the question exactly the same way
15 again. Put your full attention on it, please, Ms. Garber.

16 THE WITNESS: Okay.

17 BY MR. BORNSTEIN:

18 Q. Ms. Garber, Mr. Ostrowski, who worked in the Play Store
19 Business was fully aware of the concept at Google of copying
20 lawyers for fake privilege, correct?

21 A. No, that's not my understanding.

22 Q. Your understanding is this was a joke, correct?

23 A. Yes.

24 Q. Because fake privilege is funny?

25 A. No.

1 Q. Do you know the phrase or the -- I'll do a little
2 Shakespeare if I can: Many a true word has been spoken in jest?

3 A. I'm not familiar with that quotation.

4 Q. I'll take it out of Shakespeare. In every joke there's a
5 kernel of truth, right, Ms. Garber?

6 A. I don't think I have an opinion on that.

7 MR. BORNSTEIN: I'll pass the witness, Your Honor.

8 THE COURT: What did you mean by "fake privilege" on
9 page 48 of this exhibit?

10 THE WITNESS: It was a reference to external
11 allegations that had recently been -- become public in other
12 litigation where the litigants in that case had accused Google
13 of improperly using privilege, and it was a sarcastic reference
14 to that allegation which I disagreed with.

15 THE COURT: Pass the witness.

16 CROSS-EXAMINATION

17 BY MS. CHIU:

18 Q. Ms. Garber, are you assigned to provide legal counsel
19 regarding the Google Play Store?

20 A. No, I'm not.

21 Q. And Ms. Garber, have you provided any legal advice regarding
22 Epic Games?

23 A. Not that I recall.

24 Q. Have you ever worked on any issues relating to Fortnite?

25 A. Not that I recall.

1 Q. And have you been involved in providing legal advice to
2 anyone at Google regarding this litigation between Google and
3 Epic?

4 A. No, I haven't.

5 Q. Ms. Garber, were you deposed in this litigation?

6 A. No, I wasn't.

7 Q. Now, the Court just asked you about that second chat that we
8 just looked at. Could you just explain what you meant when you
9 used "fake privilege" in that second chat?

10 A. Yes, it was a reference to litigation that had recently
11 become public at the time in which the other party claimed that
12 Google had been improperly using the concept of attorney-client
13 privilege, and I had recently become familiar with those
14 allegations and I strongly disagreed with them. And so I was
15 using the concept here in a sarcastic way to indicate my
16 disagreement with how external parties would portray the work
17 that our team was doing.

18 MS. CHIU: Thank you, Ms. Garber. I have nothing
19 further.

20 REDIRECT EXAMINATION

21 BY MR. BORNSTEIN:

22 Q. Ms. Garber, a few very, very brief questions.

23 First of all, the litigation you were referring to
24 that you have now testified prompted your comment in
25 Exhibit 6488, that didn't prompt your "fake privilege" reference

1 in 6487, the prior exhibit, did it, Ms. Garber?

2 **A.** No, I don't think so.

3 **Q.** Okay. And you were asked a few questions about whether you
4 have Play Store responsibilities just now, right?

5 **A.** Yes.

6 **Q.** But we agree that Mr. Ostrowski, your correspondent on these
7 "fake privilege" communications, did have responsibilities for
8 supporting the Play Store Business, correct?

9 **A.** He does counsel Play, yes.

10 **Q.** Right. And he is, in fact, all over documents that were
11 exchanged by senior Play Store executives who are going to
12 testify in this case or have already testified in this case,
13 right?

14 **A.** I don't have any awareness of that.

15 **Q.** Okay. Well, we will share that with the jury soon. Thank
16 you, Ms. Garber.

17 **THE COURT:** Okay. You may step down. Careful on the
18 way down.

19 Who do we have next?

20 **MS. MOSKOWITZ:** Your Honor, Epic calls Margaret Lam to
21 the stand, please.

22 **THE COURT:** Okay.

23 **THE CLERK:** Please stand and raise your right hand.

24 MARGARET LAM,

25 called as a witness for the PLAINTIFFS, having been duly sworn,

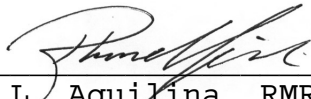
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IS A CORRECT TRANSCRIPT OF MY SHORTHAND NOTES OF THE
RECORD

OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO
TYPEWRITING BY COMPUTER TO THE BEST OF MY ABILITY.

November 9, 2023


Rhonda L. Aquilina, RMR, CRR, CSR 9956